**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **NORMAN MILLER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 268,646 |
| **STARKS, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **SAFECO INSURANCE COMPANIES** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the August 22, 2002 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for an 89 percent permanent partial general disability to the body as a whole based upon a 100 percent loss of wages and a 78 percent loss of tasks. Respondent was denied its request for reimbursement for a hot tub and for a scooter, ordered earlier to be paid at respondent's expense. Respondent was also denied an offset under K.S.A. 44-501(h) for claimant's Social Security retirement benefit. The Appeals Board (Board) heard oral argument on May 21, 2003. Gary M. Peterson was appointed as Board Member Pro Tem for the purposes of this appeal.

## APPEARANCES

Claimant appeared by his attorney, Roy T. Artman of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

## RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

## ISSUES

(1) What is the nature and extent of claimant's injury and disability?

(2) Is respondent entitled to reimbursement for a hot tub that was earlier ordered paid on behalf of claimant?

At oral argument, respondent announced that the dispute regarding the cost of the scooter was no longer before the Board. Additionally, respondent acknowledged that it would be inappropriate under these circumstances to apply a Social Security offset against the Award pursuant to K.S.A. 44-501(h). Therefore, that issue was also withdrawn from the Board's consideration. Finally, with regard to the nature and extent of claimant's injury and disability, the parties agreed the task loss awarded by the Administrative Law Judge of 78 percent is appropriate and that issue is also no longer before the Board for its consideration. Therefore, based on the stipulations of the parties, the Board finds the determination by the Administrative Law Judge on those issues to be appropriate and they are affirmed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant had been in the carpet/floor covering business for approximately 50 years. The entity known as Starks, Inc., the respondent in this matter, had originally been claimant's business, but he sold the business several years prior to the date of accident. Approximately two years before the date of accident, claimant again began working for respondent in its warehouse, doing deliveries and pickups, and waiting on customers. On January 22, 2001, the date of accident, claimant was assisting a customer get some foam padding. Claimant was on an 8-foot ladder when the foam padding tore off in his hand, and he fell backwards off the ladder, onto a concrete floor.

Claimant suffered a broken pelvis and a knot on his head, he injured his elbow and broke several ribs on his left side. He also injured his foot and his toes. Surgery was performed by board certified orthopedic surgeon Greg A. Horton, M.D., at the University of Kansas Medical Center, to repair the broken pelvis. As a result of the injuries from the fall, Dr. Horton opined claimant suffered a 19 percent permanent partial impairment to the body as a whole. This opinion was provided pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), and it is adopted by the Board for the purposes of this award as the appropriate functional impairment.

Claimant was examined by Dr. Horton at the hospital on January 23, 2001, and was in the hospital until his discharge on January 29, 2001. Claimant has not worked anywhere since the accident.

At the time claimant was injured, he was 68 years old and had been receiving Social Security since age 62. These Social Security payments were started before he began working for respondent. After the accident, he continued drawing Social Security, but remained unemployed.

After claimant was released by Dr. Horton, he was provided specific restrictions of no lifting greater than 40 pounds, no crawling or kneeling, with limited standing and frequent breaks required in order for claimant to sit and rest. Dr. Horton did express some reservations about claimant returning to the carpet business as it was described to him by claimant. He agreed, however, that claimant would be able to answer the phone at the business. Dr. Horton was provided a task list, which was prepared by claimant, containing 18 separate tasks. Of those, Dr. Horton felt claimant unable to perform 14 of the 18, for a 78 percent task loss, which the parties have acknowledged is appropriate in this matter.

While he was being treated by Dr. Horton, claimant purchased a therapeutic bath/whirlpool at a cost of $3,000. Claimant argued that the prescription slip from Dr. Horton dated April 4, 2001,[1] was a prescription for the therapeutic bath/whirlpool obtained from Dr. Horton. When questioned regarding the prescription slip, Dr. Horton acknowledged prescribing whirlpool bath therapy for claimant, but did not go so far as to state that he intended for claimant to purchase his own therapeutic bath/whirlpool. He intended the prescription to refer claimant to hydrotherapy as part of an outpatient therapy program.

The Board finds that the prescription of Dr. Horton did not authorize claimant to actually purchase a hot tub, but instead was a prescription for water therapy utilizing a hot tub or therapeutic bath whirlpool. Claimant's decision to buy his own hot tub, while probably beneficial, exceeded the treatment objectives of Dr. Horton, and respondent is not liable for that cost. As respondent has already paid for the hot tub, it would be appropriate that this matter be referred to the office of the Workers Compensation Director for her consideration regarding certification to the Insurance Commissioner for reimbursement of the cost of the hot tub.[2]

Claimant was referred for vocational evaluation to Richard Santner at respondent's request. Mr. Santner opined claimant was capable of working part time in the carpet

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[1] Horton Depo., Cl. Ex. 6.

[2] K.S.A. 44-534a.

business, earning approximately $300 per week if claimant were to return to work. He felt that income potential would be entirely possible within the restrictions placed upon claimant by Dr. Horton.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[3]

K.S.A. 44-510e defines "permanent partial general disability" as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Here, the parties have stipulated that claimant's task loss is 78 percent. The only dispute remains with regard to what, if any, wage loss claimant has suffered. Claimant argues that his wage loss is 100 percent, as he is not currently employed. Respondent, however, argues that claimant has not made a good faith effort to obtain employment after his injury. K.S.A. 44-510e must be read in light of the policies set forth in *Foulk*[4] and *Copeland.*[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held that, for the purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

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[3] K.S.A. 44-501 and K.S.A. 44-508(g).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Copeland*, at 320.

Here, claimant has made no effort to obtain employment after his fall. The Administrative Law Judge found claimant's wage loss to be 100 percent, but found that because claimant was retired and on Social Security, the requirements of *Copeland* would not be applicable. However, claimant was on Social Security prior to beginning his job with respondent. Therefore, that analogy does not apply to this circumstance. A determination of good faith must be made here. Claimant's total lack of effort in obtaining a post-injury job would not constitute a good faith effort under *Copeland*. The Board finds that claimant had the ability to earn $300 per week as set forth in the opinion of Mr. Santner. Therefore, the Board imputes to claimant the $300-per-week wage. When comparing that to claimant's $680 average weekly wage, this would equate to a wage loss of 56 percent.

K.S.A. 44-510e obligates that the wage loss and task loss be averaged. With a 78 percent task loss and a 56 percent wage loss, claimant would be entitled to a 67 percent permanent partial general disability for the injuries suffered on January 22, 2001. The Award of the Administrative Law Judge is modified accordingly.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated August 22, 2002, should be, and is hereby, modified to deny payment of the hot tub as an authorized medical expense and to grant the claimant, Norman Miller, an award against the respondent and its insurance carrier for a 67 percent permanent partial general disability. Claimant is entitled to 27 weeks temporary total disability compensation at the rate of $401 per week totaling $10,826, followed thereafter by permanent partial disability compensation payable at the rate of $401 per week, for a total award not to exceed $100,000.

As of June 11, 2003, claimant would be entitled to 27 weeks temporary total disability compensation at the rate of $401 per week totaling $10,826, followed thereafter by 97.29 weeks permanent partial disability compensation at the rate of $401 per week totaling $39,013.29. Thereafter, the remaining $50,160.71 will be paid at the rate of $401 per week for 125.09 weeks until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roy T. Artman, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Director